ORIGINAL

No. 94-9247

Supreme Court, U.S.
FILED
AUG 7 1995
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CHARLES CARLISLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTION PRESENTED

Whether the district court lacked authority to grant a post-verdict motion for judgment of acquittal filed outside the time limits prescribed by Federal Rule of Criminal Procedure 29(c).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B4) is reported at 48 F.3d 190.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1995. The petition for a writ of certiorari was filed on May 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the United States District Court for the Western District of Michigan indicted petitioner for conspiring to possess marijuana with intent to distribute it, in

violation of 21 U.S.C. 846. Following a jury trial, petitioner was found guilty. He filed an untimely post-verdict motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(c), which the district court initially denied, and then sua sponte reconsidered and granted. Pet. App. A1-A5. The court of appeals reversed on the ground that the district court lacked authority to consider the untimely motion. Pet. App. B1-B4.

1. Petitioner's jury trial began on June 30, 1993. He did not move for a judgment of acquittal under Fed. R. Crim. P. 29(a) at any time during the trial. After the jury returned a verdict of guilty, it was discharged on July 13, 1993. Petitioner filed a post-verdict motion for judgment of acquittal on July 23, 1993, one day after the seven-day period allowed for such motions under Fed. R. Crim. P. 29(c).[1] He asserted that the evidence was insufficient to demonstrate that he participated in the conspiracy. In a written opinion dated August 24, 1993, the district court did not address the lateness of the motion, but denied it on the ground that the evidence was "sufficient for a rational trier of fact to find that [petitioner] knowingly and voluntarily joined the conspiracy." United States v. Carlisle, No. 1:93:CR:66-02 (W.D. Mich. Aug. 24, 1993), slip op. 7 (attached).

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[1] Rule 29(c) provides that "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Fed. R. Crim. P. 45(a) provides that "Saturdays, Sundays and legal holidays shall be excluded" from the seven-day period. Excluding the weekend of July 17-18, 1993, petitioner's motion was one day late.

When petitioner appeared for sentencing on October 14, 1993, the district court on its own motion reversed its earlier decision and granted a judgment of acquittal. Pet. App. A1-A5; id. at B2. Noting that the motion was filed after the filing deadline, the court nonetheless treated it as timely, stating:

> I can conceive of no prejudice to the United States which will result from consideration of a motion that is one day late in this case. Because I believe that refusal to hear this motion would result in grave injustice, and because the Rule permits the Court to extend the deadline, I will consider this motion as if it were filed in a timely manner.

Id. at B1 n.1. Reviewing the same evidence that it had considered in its initial opinion, the district court concluded that the evidence was "insufficient to prove beyond a reasonable doubt that [petitioner] knowingly and voluntarily joined the conspiracy." Id. at A5.

2. The court of appeals reversed. Pet. App. B1-B4. Relying on its earlier decision in United States v. Davis, 992 F.2d 635 (6th Cir.), cert. denied, 114 S. Ct. 265 (1993), the court held that the district court lacked jurisdiction to grant an untimely motion for acquittal under Fed. R. Crim. P. 29(c), or to enter a judgment of acquittal sua sponte after the case has been submitted to the jury. Pet. App. B3-B4. Although both parties briefed the question whether the evidence was sufficient, Gov't C.A. Br. at 9-11; Pet. C.A. Br. at 9-15, the court of appeals did not address whether the evidence was sufficient to support the conviction. See Pet. App. B3-B4.

ARGUMENT

Petitioner contends (Pet. 3-6) that a district court has authority to grant an untimely post-verdict motion for judgment of acquittal, and that the contrary decision below conflicts with the decisions of other courts of appeals. The decision of the court of appeals is correct, there is no circuit conflict, and the issue presented warrants no further review.

1. The decision of the court of appeals is in accord with the text of Rule 29(c), which provides that a motion for judgment of acquittal after verdict "may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Rule 45(b) in turn provides that the district court "may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them." These two Rules, read together, show that the seven-day time limit in Rule 29(c) is mandatory, and that the court cannot retroactively extend it.

Rule 29 also prohibits the district court of appeals from achieving the same result by sua sponte granting an acquittal afte. the seven-day time limit has elapsed. In United States v. Smith, 331 U.S. 469 (1947), this Court held that a district court may not grant a new trial on its own motion under Fed. R. Crim. P. 33 beyond the Rule's time limit for making new trial motions. In language that parallels that of Rule 29(c), Rule 33 authorized a motion for a new trial "within 5 days after verdict or finding

of guilty or within such further time as the court may fix during the 5-day period."[2] Although Rule 33, like Rule 29(c), does not expressly address sua sponte action by the court, this Court in Smith concluded that the "expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initiative." 331 U.S. at 475. The Court explained that "[t]he trial judge is given power by the Rules to entertain motions for new trial within five days after verdict and may extend that time for so long as he thinks necessary for proper consideration of the course of the trial," but emphasized that "extension of that time indefinitely is no insurance of justice." Id. at 475-476. Rather, "[i]t is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past." Id. at 476.[3] The same reasoning applies to the time limits established in Rule 29(c).

2. The decision of the court of appeals accords with the holdings of other circuits that a district court lacks authority

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[2] The 1966 amendments to Fed. R. Civ. P. 29(c) and 33 extended the time limits in both Rules from five days to seven.

[3] Contrary to petitioner's contention (Pet. 4-5), Smith does not contemplate a case-by-case evaluation of whether "a considerable period of time" has passed creating a risk of uncertainty regarding the strength of the evidence in the individual case. Rather, Smith made clear that "[t]he time limitations of Rule 33 are jurisdictional." 3 Charles Alan Wright, Federal Practice and Procedure (Criminal) § 558, at 360 (2d ed. 1982); id. at 361 n.1 (collecting cases).

to grant an untimely motion under Rule 29(c). See, e.g., United States v. Stevens, 978 F.2d 565, 569 (10th Cir. 1992); United States v. Hocking, 841 F.2d 735, 736-737 (7th Cir. 1988); United States v. Johnson, 487 F.2d 1318, 1321 (5th Cir.), cert. denied, 419 U.S. 825 (1974). See also United States v. Davis, 992 F.2d 635, 636-640 (6th Cir.), cert. denied, 114 S. Ct. 265 (1993).

Petitioner claims (Pet. 4) that several circuits have adopted a contrary rule. While some decisions contain language suggesting that a district court has inherent authority to enter a judgment of acquittal even when the defendant fails to file a motion within time limits imposed by Rule 29, no other decision has reached a result that squarely conflicts with the decision below. Rather, the allegedly conflicting decisions have all involved action by the court or the defendant within the time limits of Rule 29.

In Arizona v. Manypenny, 672 F.2d 761, 764-765 (9th Cir.) (Kennedy, J.), cert. denied, 459 U.S. 850 (1982), the defendant filed his Rule 29(c) motion within seven days of the jury's verdict. The district court initially denied the motion, but then sua sponte granted it in connection with its consideration of a motion for an arrest of judgment under Fed. R. Crim. P. 34. The court of appeals held only that the district court had authority to revisit its earlier denial of the timely filed Rule 29 motion in those circumstances; it expressly declined to "address the scope of inherent power in other contexts." 672 F.2d at 766. The Ninth Circuit has not applied the theory of

"inherent power" voiced in Manypenny outside of the circumstance in which defendant the timely filed a motion. See United States v. Godoy, 678 F.2d 84, 88 (9th Cir. 1982), cert. denied, 464 U.S. 959 (1983) (stating that sua sponte district court action under Rule 29(c) more than seven days after the verdict would have been untimely where "[n]othing had been done during [the time allowed by Rule 29(c)] by either the parties or the court to preserve the matter for such late action").

In United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987), the defendant sought an extension of time for filing a motion for judgment of acquittal within the seven-day period. The court, however, granted the requested extension after that period had elapsed. The court of appeals concluded that the failure of the defendant to file his Rule 29 motion in a timely fashion did not prevent the district court from acting on it, because the court believed that "a district court may enter a judgment of acquittal 'sua sponte under its inherent power,' without regard to the seven-day requirement of Rule 29." 811 F.2d at 807, citing United States v. Giampa, 758 F.2d 928, 936 n.1 (3d Cir. 1985).[4] In Coleman, unlike here, the defendant had

[4] Giampa is inapposite here. In that case, the district court discharged the jury citing a violation of Brady v. Maryland, 373 U.S. 83 (1963), but eight days later entered a judgment of acquittal based on insufficient evidence. The court of appeals concluded that Rule 29 did not prohibit the court's action eight days after trial because of the court's "inherent power." 758 F.2d at 936 n.1. The court of appeals had previously determined, however, that the district court's statements during trial revealed that the basis for his termination of the case and dismissal of the jury was his belief that the government's evidence was insufficient. Id. at 934-935.

taken action to preserve his rights within the time limits prescribed by Rule 29, and his later motion was untimely because of error by the court. The Third Circuit has not had occasion to revisit the issue in a concrete context since Coleman.[5]

The other cases cited by petitioner discuss the time limits in Rule 29(c) only in dictum. United States v. DiBernardo, 880 F.2d 1216, 1225 n.4 (11th Cir. 1989), did not involve a Rule 29(c) motion, but referred to Coleman and Manypenny in ruling on the timeliness of a motion for a new trial under Fed. R. Crim. P. 33. United States v. Mendoza, 565 F.2d 1285 (5th Cir. 1978), also did not involve Rule 29(c), but addressed the timeliness of a Rule 35 motion for reduction of sentence; moreover, since Mendoza, the Fifth Circuit has also noted "the conceded lack of jurisdiction of a district court to consider an untimely motion for judgment of acquittal." United States v. Brown, 587 F.2d 187, 190 n.6 (5th Cir. 1979) (dictum).

3. In any event, the question presented here is of limited practical importance. Rule 29(a) authorizes motions for judgment of acquittal before a case is submitted to the jury but after the evidence on either side is closed. Although petitioner failed to

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[5] See United States v. Wright-Barker, 784 F.2d 161, 170 n.8 (3d Cir. 1986) (noting in dictum Giampa's apparent tolerance of a district court's sua sponte grant of a judgment of acquittal in the absence of a timely motion, but observing that the district court in the case before it had not sought to exercise any such authority); United States v. Knox, 977 F.2d 815, 819 (3d Cir. 1992) (noting that district court had discretion under Coleman but that it acted within its discretion in declining to reach merits of Rule 29 motion filed three months after verdict), vacated on other grounds, 114 S. Ct. 375 (1993).

do so here, defendants typically file such motions and thereby preserve their right to appellate review of evidentiary sufficiency even in the absence of a Rule 29(c) post-verdict motion. See, e.g., United States v. Sharif, 817 F.2d 1375, 1377 (9th Cir. 1987). The same standard governs an appeal from the denial of the Rule 29(a) motion as applies to a Rule 29 motion made at any stage in the district court -- i.e., whether the evidence, taken in the light most favorable to the government, is sufficient for a reasonable jury to find the defendant guilty beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Overmyer, 867 F.2d 937, 938 (6th Cir.), cert. denied, 493 U.S. 813 (1989). Thus, in the typical case, failure to file a timely Rule 29(c) motion merely changes the forum in which a defendant presents his post-verdict sufficiency claim. And even a defendant who does not file any timely motion under Rule 29 may seek appellate review of his claim of evidentiary insufficiency under a plain error standard, see Fed. R. Crim. P. 52. See, e.g., United States v. Fagan, 821 F.2d 1002, 1009 n.2 (5th Cir. 1987). The holding of the court of appeals thus does not completely foreclose judicial review of the sufficiency of the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1995

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BY

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v

CHARLES CARLISLE,

Defendant.

File No. 1:93:CR:66-02

HON. RICHARD A. ENSLEN

OPINION

The matter before the Court is defendant Carlisle's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c). Defendant was charged in a single count Indictment with conspiracy to possess marijuana with intent to distribute. On July 13, 1993, a jury found defendant guilty. Defendant's motion does not claim that there was not an agreement to possess and distribute marijuana. Instead, his motion argues that the evidence was insufficient to prove that he joined the conspiracy.

The standard of review for claims of insufficient evidence is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); United States v. Boling, 869 F.2d 965 (6th Cir. 1989). Reviewing the evidence in the light most favorable to the government means that I must make all credibility choices and inferences

in a manner that supports the jury's verdict. Further, circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt. United States v. Stone, 748 F.2d 361, 363 (6th Cir. 1984).

The evidence presented against Carlisle at trial was as follows. On the evening of April 10, 1993, defendant Rupert (Carlisle's common-law wife), defendant Ramon (Ms. Rupert's mother), and Thomas Crawford arrived at the residence on Yale Street that Carlisle and Rupert shared. Ramon travelled in a car driven by Rupert, and they were followed by a truck full of marijuana. That truck was driven by Crawford, the government's primary witness, who was wearing a tape-recording device at the time.

In his opening statement, defendant's counsel stated that Rupert told Carlisle that the truck contained marijuana, and that she was scared. The inference that Carlisle knew that the truck contained marijuana could also be drawn from a hearsay statement by Rupert I admitted. As soon as Ramon, Rupert and Crawford arrived at the Yale Street residence, Crawford recorded the following statement of Rupert: "Okay, just pull out and Chuck [Carlisle] says to go down the street and just park for awhile because he said he's heard over the scanner, there's some cops around here." Exhibit 48-A, Transcript of Nagra Tape #2, Cassette #1A, p. 5. Crawford parked the truck down the street.

When Crawford returned from parking the truck, he was introduced to Carlisle. Crawford testified that Carlisle was quiet

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and did not appear nervous. At this point, the parties appear to be discussing where to park the truck for the evening, and the following conversation ensued:

Ramon: We can park it behind the house.

Crawford: All right mighty good.

Carlisle: Figure right down the drive.

Ramon: Yeah, because my son called, my grandson called and said there was cops around here.

Rupert: around this area

Ramon: unintelligible

Rupert: and we don't want to take a chance right now

Carlisle: We don't want to take no chances.

Crawford: No, un uh, that's why I was going, I, the speed limit was thirty and so I stayed right on it.

Ramon: Yeah? Oh and before I forget, on the key, the combination. I took the thing off and I put it on there so . . .

Carlisle: Okay . . . is that for the back?

*** (one page later) ***

Ramon: We're going (unintelligible)

Crawford: Oh yeah it's best not take any . . .

Carlisle: No I won't take no chances . . .

Crawford: Okay.

Id. at 5-7.

At Rupert's request, Carlisle then drove Amelia Ramon to her home shortly after Rupert, Ramon and Crawford arrived at the Yale

Street residence. The truck full of marijuana, driven by Crawford, followed. The truck was left at Ramon's home, and Crawford joined Carlisle and Ramon in the car. Carlisle then drove Crawford and Ramon to the Stouffer Hotel. During this trip, tape recordings indicated that there was nothing but casual banter about topics such as cars and the city of Battle Creek. Carlisle dropped them off and left. There was no evidence that Carlisle had any further contact with any member of the conspiracy.

Upon review under the foregoing standards, I find that the evidence in this case is sufficient to sustain defendant's conviction. Viewed in the light most favorable to the government, I believe that a rational trier of fact could find beyond a reasonable doubt that Carlisle knew about the conspiracy, and that Carlisle knowingly and voluntarily joined the conspiracy.

Instruction 10C explained that in order to establish knowing and voluntary joinder,

> the government must prove that [the defendant] knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve his goals. . . . But proof that a defendant simply knew about a conspiracy, or was present at the time, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.

Sixth Circuit Pattern Criminal Instruction No. 3.03 (1991).[1] Review of two cases in which the Sixth Circuit found that the government did not carry the burden described above is instructive. In the unpublished decision of United States v. Burgess, 1992 U.S. App. LEXIS 34740 (6th Cir.), the court acknowledged that "[c]onspiracy cases often present difficult questions about the extent to which seemingly passive participants are nonetheless culpable members of the conspiracy." Id. at *21. The appellate panel went on to hold that there was insufficient evidence to support defendant Burgess' conviction for conspiracy to possess marijuana with intent to distribute. In Burgess, a defendant named Muncy planned to buy marijuana from a DEA agent and informant. Muncy drove to the scheduled rendezvous point with Burgess and a third defendant, Rose. When they arrived, Muncy walked to the agents' car and discussed the purchase. Muncy then went back to his own car and brought Rose to the agents' car with him. After the transaction began, all three were arrested. A search of the car revealed a loaded revolver and $15,000 in cash in the front seat, and scales in the trunk.

Upon review of these facts, the Sixth Circuit concluded that the jury could have inferred Burgess' knowledge of the purpose of the trip, White's possession of money to purchase marijuana, and

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[1] The Committee Notes cite many cases in support of this instruction. E.g., United States v. Richardson, 596 F.2d 157, 162 (6th Cir. 1979) (there must be proof of an intention an agreement to cooperate in the crime); United States v. Bostic, 480 F.2d 965, 968 (6th Cir. 1973) (there must be intentional participation in the transaction with a view to the furtherance of the common design and purpose).

even the presence of a weapon in the car. However, because Burgess did not participate in the discussions with the agents, he was not mentioned in those conversations, he did not drive the car, and he never left the middle of the front seat, the court held that a rational trier of fact could not find that Burgess knowingly and voluntarily joined the conspiracy.

United States v. Pearce, 912 F.2d 159 (6th Cir. 1990), cert. denied sub nom Thorpe v. United States, 111 S.Ct. 978 (1991), provides another example of evidence which the Sixth Circuit found to be insufficient to sustain a conspiracy conviction. Defendants Thorpe and Pearce were convicted of conspiring to possess and distribute crack in violation of 21 U.S.C. § 846 on the following evidence. A SWAT team entered what they suspected was a crack house after an informant purchased crack at the house with registered bills. When they entered, Thorpe ran into the basement yelling "it's a bust." The SWAT team found Thorpe nearby two doses of crack and a loaded revolver. Thorpe had a live round in his pocket that matched those found in the gun. The police found Pearce sitting on a couch in the living room. Next to him was a bag of crack and the registered bills the informant used in his purchase.

The Sixth Circuit reversed both conspiracy convictions. It found that the record was devoid of any evidence that Thorpe and Pearce had entered into an agreement. Although the defendants' presence at the house was unexplained, the court concluded that no rational trier of fact could have found that even tacit coordination between Thorpe, Pearce, or any third party, to maintain a crack house or to distribute crack.

The evidence against Mr. Carlisle surpasses that presented in Burgess and Pearce. Unlike the Burgess defendant, he was more than just present during the conspiracy. He took actions to help hide the contraband from the police. He stated his intention to not "take chances." He inquired whether a key unlocked the back of the truck which contained the marijuana. And finally, in contrast to the Pearce defendants, Mr. Carlisle's use of the word "we" in a statement made to other conspirators during a conversation about where to put the truck full of marijuana to avoid the place, "we don't want to take no chances," could indicate joinder with the conspiracy to a rational trier of fact. I find that Carlisle's hearsay statement concerning the scanners, his statements evincing a desire to avoid the police, and the fact that he drove a conspirator (his common law mother-in-law) to her home, and then drove two conspirators to a hotel and dropped them off, is sufficient for a rational trier of fact to find that he knowingly and voluntarily joined the conspiracy.

Viewing the evidence in the light most favorable to the government, I find that the government's case against Charles Carlisle is sufficient to prove beyond a reasonable doubt that Carlisle knowingly and voluntarily joined the conspiracy. As a result, defendant's motion will be denied.

Dated in Kalamazoo, MI:

May 19, 1993

Richard A. Enslen

RICHARD A. ENSLEN
United States District Judge

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v

CHARLES CARLISLE,

Defendant.

File No. 1:93:CR:66-02

HON. RICHARD A. ENSLEN

ORDER

In accordance with the Opinion entered on this date;

IT IS HEREBY ORDERED that defendant Carlisle's motion for a judgment of acquittal pursuant to Rule 29(c), filed July 23, 1993, **is DENIED.**

Dated in Kalamazoo, MI:

Aug 19, 1993

RICHARD A. ENSLEN
United States District Judge

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